INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Argument	6
Conclusion	9

CITATIONS

Cases:

American Federation of Labor v. *National Labor Relations Board*, 308 U.S. 401	7
Boire v. *Greyhound Corp.*, 376 U.S. 473	7, 8
Highway Truck Drivers & Helpers Local 107 v. *National Labor Relations Board*, 273 F. 2d 815	6
Leedom v. *Kyne*, 358 U.S. 184	7
Local 542, etc. v. *National Labor Relations Board*, E.D. Pa., Civil Action 35,664	6
National Labor Relations Board v. *Auto Ventshade, Inc.*, 276 F. 2d 303	8
National Labor Relations Board v. *Electrical Workers*, 308 U.S. 413	7
National Labor Relations Board v. *Falk Corp.*, 308 U.S. 453	7
National Labor Relations Board v. *Trimfit of California*, 211 F. 2d 206	8
Ove Gustavsson Contracting Co. v. *Floete*, 278 F. 2d 912, certiorari denied, 364 U.S. 894	8
Pacemaker Corp. v. *National Labor Relations Board*, 260 F. 2d 880	8
Progressive Mine Workers v. *National Labor Relations Board*, 187 F. 2d 298	6
Surprenant Mfg. Co. v. *Alpert*, 318 F. 2d 333	8
Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474	6

Statutes: Page

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) .. 2
Section 8(b)(1)(A) 5, 6
Section 10(e) 7
Section 10(f) 7
Administrative Procedure Act (61 Stat. 237, 5 U.S.C. 1001, *et seq.*) 2

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 174

LOCAL 542, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 24a-30a) is reported at 328 F. 2d 850. The Board's decision and order (Pet. 7a-23a) are reported at 139 NLRB 1169.

JURISDICTION

The decision of the court of appeals (Pet. 24a-30a) was entered on March 13, 1964, and its decree (Pet.

31a-32a) was entered on April 15, 1964. The petition for a writ of certiorari was filed on June 11, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that the union's conduct relating to a picket line during a strike at the Company tended to restrain and coerce the Company's employees in violation of Section 8(b)(1)(A) of the National Labor Relations Act.

2. Whether the court of appeals correctly decided that it lacked jurisdiction to compel the Board to hold a representation election.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), and the Administrative Procedure Act (61 Stat. 237, 5 U.S.C. 1001, *et seq.*) are reprinted in the petition (Pet. 1a-6a).

STATEMENT

a. *The Board's Findings of Fact.*—On March 5, 1962, petitioner Union filed a petition for certification as the collective bargaining representative of the production and maintenance employees of Giles and Ransome, Inc., which is engaged in the sale and service of earth-moving equipment. A hearing was held on

the petition on March 27 and April 23, 1962, but, due to the unfair labor practices hereafter described, no election has as yet been scheduled (Pet. 12a).

At a meeting of the Company's employees held on March 13, the employees voted in favor of a strike, which began the next day and continued for approximately 10 weeks. The entrance to the Company's plant was picketed on a 24-hour, around-the-clock basis by the striking employees and by other union members. William Adley, the Union's treasurer, supervised the picket line daily (Pet. 12a-13a; J.A. 101a, 130a).[1]

On March 16, office boy Henry Olczak drove his car slowly up to the plant entrance and stopped at the picket line. Adley remarked to Olczak, a 19-year old boy, that he would never reach the age of 21 if he were "ever caught taking parts in and out of Giles and Ransome" (Pet. 13a-14a; J.A. 27a-28a).

On March 22, Adley asked Botnick, a nonstriking sales demonstrator for the Company, not to drive through the picket line. Adley told Botnick that he would be blacklisted by the Union if he went through the line and that he would be prevented from working on any union jobs. Botnick said that he had to go through. Police officers, who were present throughout the picketing, opened up the line for Botnick. As he drove past the pickets, Adley yelled at him, "You'll pay for this" (Pet. 15a; J.A. 32a-33a). About a week later, Botnick was again stopped at the picket line.

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[1] "J.A." refers to the Joint Appendix in the court below, which has been filed with the petition.

This time Adley told him: "Before this is all over your car is going to have to be painted black. * * * That car and you will be in black crepe paper." The police on duty opened up the picket line and Botnick went through (Pet. 15a; J.A. 34a).

Joseph Parker, who had been on strike, attempted to return to work on March 22, but was stopped at the picket line and asked by Adley and a striker why he was returning to work. After some discussion Parker agreed to stay on strike for one more day. As he turned his car around, he noticed a flat rear tire. Parker subsequently found that the side of the tire had been slashed (Pet. 15a-16a; J.A. 60a).

About 10 a.m. on March 27, as Police Officer William Edwards was letting a truck out of the Company's plant, he saw Adley place an object under the truck's left front tire. Edwards immediately stopped the truck and had it backed up. Adley then removed a piece of tile with several nails in it from the tire, saying to Edwards: "You got me now. You got me this time" (Pet. 17a-18a; J.A. 49a-50a).

That same day, at about 11:30 a.m., Sales Demonstrator Botnick and Salesman Theodore Stratton delivered a Company bulldozer to a job site in Philadelphia. Shortly after their arrival, Union Business Agent Armon Acchioni told Botnick, "Anyone that goes through a picket line deserves to get his head split open" (Pet. 16a; J.A. 36a). About noon Adley and some Company employees came to the job site. Adley told Botnick and Stratton that, if the Company did not become unionized, it "wouldn't be able to get any equipment on any union job," and that the two

men would "never be able to work on any union jobs." He declared, referring to the picket line, "They think they've seen violence—they don't know what violence is." He named several customers of the Company, and stated that Company equipment would be barred from their jobs and the Union would picket wherever Company equipment went (Pet. 16a-17a; J.A. 37a, 43a-44a).

b. *The Board's Conclusions and Order.*—The Board found (Pet. 7a-8a, 21a) that the Union violated Section 8(b)(1)(A) of the Act by threatening employees with physical harm, blacklisting, and other economic reprisals for crossing the Union's picket line; by damaging the automobile of an employee who sought to cross the picket line; and by damaging a truck that was leaving the employer's premises. The Board's order (Pet. 8a-9a) requires the Union to cease and desist from the unfair labor practices found and from any like or related conduct, and to post appropriate notices.

c. *The Court of Appeals' Decision.*—The Union requested the court of appeals to set the Board's unfair labor practice order aside, and to direct the Board to conduct a representation election on its petition. The court, finding substantial evidence to support the Board's unfair labor practice finding, enforced the Board's order. Concluding that it lacked jurisdiction to direct the Board to conduct an election, the court denied the Union's request for an election[2] (Pet. 24a-30a).

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[2] Subsequent to the court of appeals' decision, the Union filed suit in a federal district court, again seeking to compel

ARGUMENT

1. Petitioner's contention that the incidents of misconduct found to be violative of Section 8(b)(1)(A) were too trivial to be coercive (Pet. 11-13, 22-24) raises an issue concerning the substantiality of the evidence which does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491. In any event, the evidence fully supported the Board's findings.

As the court below noted (Pet. 26a), since "the incidents occurred in the early days of the strike and within the relatively short period of eleven days, when the Union was most active in its organizational effort," the Board was warranted in concluding that the conduct of the offenders—who were top officials of the Union—"created an atmosphere of coercion and intimidation." It is not material that there was no showing that anyone was in fact coerced or intimidated by the Union's action. As the court added (Pet. 26a-27a), the test is "not whether the misconduct proves effective," but "whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." *Highway Truck Drivers & Helpers Local 107* v. *National Labor Relations Board*, 273 F. 2d 815 (C.A. D.C.); *Progressive Mine Workers* v. *National Labor Relations Board*, 187 F. 2d 298, 301 (C.A. 7).

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the Board to hold an election. *Local 542, etc.* v. *National Labor Relations Board*, E.D. Pa., Civil Action 35,664. The case has not yet been reached for hearing.

2. Petitioner's further contention (Pet. 8-11, 13-22, 24-25) that the court of appeals should have directed the Board to hold a representation election is without merit. Since the court of appeals had no jurisdiction over this issue, it correctly refused to consider the Union's contention.

It is well settled that the jurisdiction conferred on the court of appeals by Section 10(e) and (f) of the Act, which empower the courts of appeals to review a "final order of the Board," does not include jurisdiction to direct the Board to hold an election or issue a certification. *American Federation of Labor* v. *National Labor Relations Board*, 308 U.S. 401; *National Labor Relations Board* v. *Electrical Workers*, 308 U.S. 413. The Act provides for review in the court of appeals of Board action in a representation proceeding only where it has become the basis of a final order in an unfair labor practice case which is itself before the court for review or enforcement. The representation proceeding which petitioner sought to have reviewed did not form the basis of the unfair labor practice case before the court of appeals, and hence the foregoing exception is inapplicable here. Cf. *National Labor Relations Board* v. *Falk Corp.*, 308 U.S. 453.

Leedom v. *Kyne*, 358 U.S. 184, did not extend the reviewing authority of the court of appeals over representation proceedings. That case involved a suit in the federal district court, whose jurisdiction is not as narrowly circumscribed as that of a court of appeals. Indeed, in *Boire* v. *Greyhound Corp.*, 376 U.S. 473, which also involved an effort to obtain review of a Board representation proceeding in the

district court, this Court, in emphasizing the limited reach of *Kyne*, indicated that it had nothing to do with the review of representation determinations in the court of appeals; the Court stated that it has "consistently refused to allow direct review of such orders in the Courts of Appeals * * *." *Id.* at 479. Nor does the Administrative Procedure Act empower the court of appeals to review a Board representation proceeding where the National Labor Relations Act, as construed by this Court, denies it. As the court below pointed out (Pet. 29a), the Administrative Procedure Act is "remedial and not jurisdictional." See *Ove Gustavsson Contracting Co.* v. *Floete*, 278 F. 2d 912, 914 (C.A. 2), certiorari denied, 364 U.S. 894.[3]

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[3] Even if the court of appeals had jurisdiction to direct the Board to hold an election, it is clear that the Union's contention is without substance on the merits. The Board has discretion to refuse to proceed to an election where unfair labor practices have been committed which would tend to preclude a free choice by the employees. *Surprenant Mfg. Co.* v. *Alpert*, 318 F. 2d 396 (C.A. 1); *Pacemaker Corp.* v. *National Labor Relations Board*, 260 F. 2d 880, 882 (C.A. 7); *National Labor Relations Board* v. *Auto Ventshade, Inc.*, 276 F. 2d 303, 307 (C.A. 5); *National Labor Relations Board* v. *Trimfit of California*, 211 F. 2d 206, 209 (C.A. 9). It did not abuse its discretion in following that course here until the Union removes the coercive effect by complying with the Board's unfair labor practice order.

CONCLUSION

For the reasons stated above, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

LAURENCE S. GOLD,
Attorney,

National Labor Relations Board.

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